NO. 34935-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

LAURA TAYLOR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Carrie L. Runge, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion for a Franks[1] hearing.

2. The trial court erred in entering finding of Fact 4 and Conclusions of Law 2-5. CP 82-84.

Issue Pertaining to Assignments of Error

Officers found appellant at the location where they were investigating a trespass or burglary. She was removed from the residence and handcuffed. Looking for her identification, officers took possession of a large black purse that was in the residence. This large purse contained a smaller black purse (which belonged to appellant), a separate zippered pouch, and various other items. Appellant informed officers that only the smaller purse belonged to her. Appellant's identification was found in that purse. Meanwhile, an officer took the opportunity to rummage around in the larger black purse to inspect its contents. She even removed the pouch, unzipped it, and peered in at its contents. After appellant was arrested, officers sought a search warrant to officially sanction the inspection of the purse, claiming to be looking for burglary tools and

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[1] Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

stolen property. In the supporting affidavit, police failed to explain that there were multiple purses, misleading the judge into believing there was only one purse and it belonged to the appellant. Additionally, the affiant failed to inform the judge that an inspection of the large purse and the zippered pouch had occurred, without anything of evidentiary value being reported. After obtaining a search warrant, officers discovered methamphetamine in the small zippered pouch that was contained in the large purse, not appellant's purse. Did the trial court err when it denied appellant's request for a Franks hearing?

B. STATEMENT OF THE CASE

1. Procedural History

On February 8, 2016, the Benton County prosecutor charged appellant Laura Taylor with one count of unlawful possession of a controlled substance and one count of possession of stolen property. CP 1-3. A jury found her guilty of the first charge, but it could not reach a unanimous verdict on the second charge. CP 60-61. Taylor appeals her conviction. CP 76-77.

2. Substantive Facts

Sheena Marie LePaige is Taylor's friend. 2RP 56, 132. LePaige had lived at the Santiago Sunset Estates mobile home

park in Kennewick, Washington for a few years before she was evicted in April 2015. 2RP 21-24, 44.[2] A neighbor testified that, over the years, LePaige appeared to have gotten into drugs and she carried around various purses that she often hugged to her chest in a protective way. 2RP 41-42.

On August 27, 2015, the park manager Janine Evans gave LePaige's uncle permission to enter the trailer to retrieve LePaige's personal items. 2RP 45. LePaige and Taylor showed up to get these items. 2RP 132. While LePaige was there, someone called police and directed them to the location, informing police that LePaige had a warrant out for her arrest. 2RP 131. When Office Joshua Sullivan arrived, he found Le Paige and Taylor present. 2RP 131. Taylor was outside the trailer, and she yelled to LePaige who was inside the trailer. 2RP 132. Le Paige exited and Officer Sullivan arrested her on the outstanding warrant. 2RP 132. Upon LePaige's arrest, Taylor agreed to collect LePaige's property. 2RP 132.

A few days later, Taylor returned to the residence with a silver Durango truck to remove LePaige's property. 2RP 53; CP

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[2] Transcripts are referred to as follows: 1RP (October 5, 2016); 2RP (November 7, 8, 16, 2016); 3RP (December 14, 2016).

16. The property manager called police to report a trespass or burglary. 2RP 46, 52. Officers arrived and found Taylor moving things out of the residence. 2RP 54. Taylor was handcuffed. 2RP 55. Officers made a protective sweep of the trailer and saw it was in disarray. 2RP 56, 84. Inside the residence, officers observed a large black purse that contained a smaller purse and a black zippered pouch. RP 84, 86. Outside, officers observed Taylor's truck filled with various personal items, fixtures, and a breaker box. 2RP 56, 84. Taylor told police that she was helping a friend and she believed she had permission to take the items. 2RP 56; CP 16.

Officers searched Taylor's pockets and found an Allen wrench, screws, and washers. 2RP 59. When officers asked Taylor for identification, she said it was in her purse, which was in the truck, but then she recalled it might be in the house. 2RP 96. When officers asked if they could retrieve the purse to obtain her identification, Taylor said, "I prefer you didn't."[3] CP 9; 1RP 6. Despite this, the purses were retrieved. 2RP 86.

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[3] Contrarily, officers claimed Taylor consented to inspection of her purse. 2RP 91, 109.

Taylor informed officers that the larger purse and its contents were not hers. 2RP 87, 91. The smaller purse that was inside the big black purse was Taylor's, and that was where the officers found her identification. 2RP 87, 88, 91. Rather than leaving it at that, however, Officer Shirrel Veitenheimer set the large purse on the ground and kicked at it so she could inspect its contents. CP 10; 1RP 6. She also took out the zippered pouch that was in the larger purse, unzipped it, and looked inside. CP10; 1RP 6.

Eventually, Taylor was booked for possessing stolen property. CP 17. Meanwhile, officers sought a search warrant to search the truck and Taylor's purse. CP 14-19. The affiant stated this was necessary to further the investigation into the charge. CP 18. However, the affiant failed to inform the judge that officers had taken possession of multiple purses -- only one of which Taylor claimed as her own. CP 14-19. Instead, he implied that there was only one purse. CP 15-19. Finally, he failed to inform the judge that an officer had already inspected the large purse and the zipper pouch it contained. CP 14-19. A warrant was issued based on the limited information provided. Ex. 1. When executing the search, officers discovered methamphetamines inside the zippered pouch. 2RP 68.

Prior to trial, Taylor moved for a Franks hearing. CP 9-19. She pointed to four misrepresentations or omissions of material facts that were made with intentional or reckless disregard for the truth. CP 9-12. Specifically, she alleged: (1) the affiant failed to disclose that an officer had already rummaged through the large purse with her foot, had removed a zippered pouch and unzipped it to look inside; (2) the affiant wrongly claimed Taylor consented to the retrieval and search of her purse; (3) the affiant omitted the fact that there was more than one black purse and Taylor only claimed ownership of the small black purse; and (4) the affiant misrepresented Taylor's statement that she believed someone wanted to recycle the breaker box, wrongly claiming Taylor had stated that she wanted to recycle it herself. CP 9-10. Counsel asserted that these misrepresentations or omissions went to the credibility of officer and that the officers were just trying to cover up their mistake in making a warrantless search by getting an after-the-fact search warrant based on an inaccurate and incomplete account of the facts.[4] CP 10-12; 1RP 4-5.

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[4] The written motion alleged facts supporting these arguments, but counsel did not attach Taylor's signed affidavit. CP 9-19. On the day of the hearing, counsel asked that Taylor be sworn in to establish the facts under oath. Rather than

In response, the prosecutor argued that none of the omitted or contested facts were material to a finding of probable cause. 1RP 8-10. The trial court agreed and denied Taylor's motion. CP 82-84.

C. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR A FRANKS HEARING.

The Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution requires probable cause to support the issuance of a search warrant. See, State v. Martines, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015) (Fourth Amendment); State v. Ollivier, 178 Wn.2d 813, 846, 312 P.3d 1 (2013) (article 1, section 7). "Probable cause exists when the affidavit in support of the search warrant 'sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.'" Ollivier, 178 Wn.2d at 846–47 (quoting State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)). The Fourth Amendment requires that a

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have her testify, the trial court permitted Taylor to be placed under oath and endorse the factual allegations made. 1RP 6.

search warrant must particularly describe the place, person, or things to be searched. State v. Eisele, 9 Wn. App. 174, 511 P.2d 1368 (1973); Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927).

Factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (1) material and (2) made in reckless disregard of the truth. Franks v. Delaware, 438 U.S. 154-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); State v. Chenoweth, 160 Wn.2d 454, 478–77, 158 P.3d 595 (2007). If the defendant makes a substantial preliminary showing of a misstatement of facts or omission that is intentional or reckless and is material to the question of probable cause, then the court must hold a Franks hearing. Ollivier, 178 Wn.2d at 847; State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). As shown below, such a showing was made here.

Taylor established several material omissions or misstatements contained in the officer's affidavit in support of the search warrant. Evidence is said to be material "when it logically tends to prove or disprove a fact in issue." State v. Gersvold, 66 Wn.2d 900, 902–03, 406 P.2d 318, 320 (1965). Materiality is judged not only on what the evidence shows but also from

whatever inferences may sensibly be drawn therefrom. Id. Thus, in this case, any fact tending to logically prove or disprove that the Taylor was involved in criminal activity or that evidence of the crime could still be located at a location is a material fact.

Taylor identified two omissions of facts that were material to the question of probable cause. First, the affidavit reveals that the affiant omitted the fact that the larger black purse and its contents had already been inspected to some degree by an officer who did not report seeing anything illegal or of evidentiary value inside. Compare, CP 10, with CP 14-18. This fact was material to the question of probable cause.

Facts are material to a probable cause determination if these facts are sufficient to establish a reasonable inference that evidence may be found at a specific location at the time the search is conducted. State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). However, the flip side is also true. Facts that support a reasonable inference that evidence will not be found in a location are also material to a proper determination of probable cause. Police cannot just cherry pick which material facts to reveal and which to sit on. They must provide the judge with all the material facts and let the judge decide what inferences to draw.

Since the large purse and its contents had been looked through and containers opened without anything of note being seen, it makes it less likely that another search was needed to find stolen property or tools. Yet, this information was never reported to the judge so he could make an independent determination of probable caused based on all the information known to police regarding these purses. In fact, the affidavit is deliberately misleading in that it implies that once officers obtained Taylor's identification then the purse was simply secured without any further action taken by police. CP 16. This clearly was not the case. Indeed, the State admits that some degree of inspection took place. 1RP 9-10. The affiant's failure to alert the judge of the fact that some inspection occurred constitutes a reckless disregard for the truth regarding a material fact.

The State's position to the contrary is based on circular logic. The prosecutor argued that because the affidavit did not contain any information that Officer Veitenheimer found something illegal or of evidentiary value in the purse, then one must infer the officer did not conduct a thorough search. From this, the prosecutor then posited that the officer's search was too limited to make the fact material as to the question of probable cause. 1RP

9-10. However, this was for the judge to decide based on all the facts. Indeed, any reasonable officer would know that a recent prior police inspection of a location or container that resulted in no evidence is a fact that must be revealed to the judge when seeking a search warrant to conduct another search of the location or container.

Ultimately, the trial court ruled the fact that the purses had been inspected to some degree was not material because there was not a "complete, thorough search of the purse." 1RP 13; CP 82-84. However, just because the officer's inspection of the large purse and its contents was not considered a "complete" search, the fact that Officer Veitenheimer did go into the purses and zippered pouch and saw no evidence worth noting was nonetheless material to the question of whether there was probable cause to search the bag further. Thus, the trial court erred when it denied appellant's request for a Franks hearing.

Next, the record shows a second material omission regarding the fact that the affiant failed to inform the judge that officers removed two black purses – with only the smaller of the two belonging to Taylor. CP 9-10; 1RP 6. Indeed, the affidavit misleads the judge as to exactly what personal item the officers are

intending to search, suggesting there is only one purse at issue. CP 16-18. There is no mention that Taylor stated that the large black purse and its contents belonged to someone else. Id.

The affiant first states that an officer discovered "a black purse" inside the residence but initially left it there. CP 16. He next states that Taylor's identification was in "the black purse" found inside the residence. CP 16. He then states that officers retrieved "the black purse." CP 16. The affiant goes on to claim that further investigation of "her [Taylor's] purse" is required. CP 17. Finally, he concludes that it is necessary to gain access to "the large black purse and its contents to locate dominion smaller stolen property and burglary tools." CP 17.

In reading the affidavit, one is misled to believe that there was only one black purse and that it belonged to Taylor. However, this was not the case. Moreover, this fact was material to establishing the specific location or item to be searched. A purse, like luggage, is a "common repository for one's personal effects" and therefore "is inevitably associated with the expectation of privacy." Arkansas v. Sanders, 442 U.S. 753, 762, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), overruled on other grounds by California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

To be valid, search warrants require specificity of the location to be searched. It was important for the judge to know that there were two purses, because only then could he be specific as to whether there was sufficient probable cause to search the purse that belonged to Taylor and the other purse that belonged to another person. These were two purses that required specific and separate probable cause to search, with officers knowing only the smaller one belonged to Taylor. As such, the fact there were multiple purses was material to a probable cause determination as to the specific search location.

In sum, this record establishes two reckless, material omissions: (1) the large purse and its contents had been previously inspected to some extent without any evidence being discovered and (2) there were multiple purses belonging to different people. This was a sufficient showing to support a Franks hearing. Hence, the trial court erred in denying Taylor a Franks hearing. Consequently, reversal is required.

D. CONCLUSION

For reasons stated above, this Court should reverse appellant's conviction.

Dated this 30TH day of June, 2017.

Respectfully submitted

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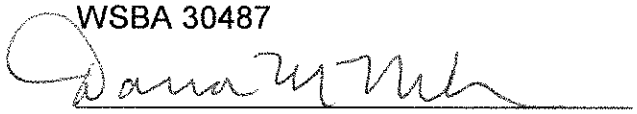

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No. 34935-7-III

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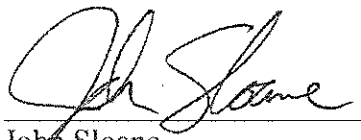

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